IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Baltej Singh & Ors. vs. State of Rajasthan & Ors.

(D.B.Civil Writ Petition (P.I.L.) No.789/06)

Date of Judgment :- 12th January, 2007.

HON'BLE THE CHIEF JUSTICE SHRI S.N. JHA
HON'BLE JUSTICE SHRI MOHAMMAD RAFIQ

Mr. H.S.Sidhu, Advocate for the petitioners.
Mr. Rameshwar Dave, Dy. Govt. Advocate for the State.
Mr. P.R.Mehta, for the respondents.
Mr. Ravi Bhansali

Reportable

BY THE COURT :-(PER HON'BLE MR.MOHAMMAD RAFIQ,J)

This writ petition by way of public interest litigation has been filed by as many as twelve residents of Pilibanga township of district Hanumangarh with the prayer that the respondents be directed to remove illegal encroachments and unauthorized constructions raised by those mentioned in Annexure P/27 in the

middle of the Kharlia Road and Nehru Dharamshala Road as shown in the enclosed map of the Pilibanga Agriculture Marketing Yard/Shopping Area. It has been asserted in the writ petition that Krishi Upaj Mandi Samiti, Pilibanga set up an agricultural marketing yard(for short " the Yard") as per the plan approved by the Chief Town Planner-cum-Architectural Adviser of the Public Works Department, Government of Rajasthan, Jaipur. The plan of the yard was approved in the year 1964 according to which sufficiently wide public roads were left open. One such road which was originally named as Hospital Road has now come to be known as Kharlia Road. This road starts from National Highway and while cutting across the yard, it runs upto village Kharlia. Apart from 80 feet wide road, 40 feet wide land alongside this road was left open for parking purposes. Thus total width of the land covered by road and parking slot was proposed to be 120 fts. Apart from the site plan of the new yard(Annexure P/1) for indicating the position of Kharlia Road, the petitioners have placed on record site plan of the old yard also to show location of Nehru Dharamshala Road as Annexure P/2.

Contention of the petitioners is that the large number of

traders/others have made encroachment in the middle of the Kharlia Road within 80 feet area of the land left for road thereby reducing width of the road to just 55 feet. It is stated that Kharlia road, being the main road of the yard, is very strategic on account of its location because on its both sides are located major shops of this grain market. In view of its importance, 40 feet wide land was deliberately left open for the purpose of parking. Those who have encroached upon part of this road have constructed shops mostly in the size of 10' x 16'. Farmers from the surrounding villages of the mandi and local residents of Pilibanga made number of complaints to the authorities for removing the encroachments from Kharlia Road. Sarpanch of Gram Panchayat , Sarawanwala also submitted written complaint to the District Collector, Hanumangarh on 20.11.2005 against such illegal encroachments. Similarly, Sarpanch of Gram Panchayat , Likhmisar has also submitted written complaint on 20.11.2005 to District Collector for removing these illegal encroachments/constructions from the middle of the Kharlia Road. Large number of residents of Pilibanga also made complaints regarding these encroachments. It was on account of so much persuasion that the municipal authorities took initiatives for removing

illegal constructions/encroachments and proceeded to demolish such illegally constructed shops. Suddenly however the petitioners were shocked to learn that the Municipal Board instead of removing the encroachments has permitted the encroachers to raise new shops after leaving 65 feet wide area for the road. They have been permitted to raise construction of the shops in the size of 8' x 10' ostensibly to reduce the extent of encroachment as earlier their construction was to the extent of 10' x 16'. The Municipal Board has taken a decision to regularize such illegal constructions made in the middle of the road even though it had earlier demolished such illegal shops in the month of November, 2005. Surprisingly, the Municipal Board in its meeting held on 21.11.2005 vide resolution no. 2 and 8 decided to regularize such illegal constructions. A copy of the proceedings of the Board dated 21.11.2005 has been placed on record. The Municipal Board not only decided to regularize the illegal constructions but also permitted such encroachers to raise new constructions in the middle of the road. One of the encroachers, namely Shri Premchand Nahta filed a civil suit before the Civil Judge (J.D.), Pilibanga in which the trial Court appointed a Commissioner to submit the exact status report of the Kharlia Road. The report

submitted by the Commissioner to the said Court has been placed on record of the present petition. Other residents of the yard also complained to the Secretary, Department of Local Self Government on 21.12.2005 for removing illegal constructions on the road and maintain the roads as per the master plan. It has been submitted that apart from Kharlia Road, the original width of Nehru Dharamshala Road in the old yard was 50 feet whereas the encroachments have been made on that road upto the extent of 15 feet and practically the width of the road has been reduced to only 35 feet. Contention of the petitioners is that the Municipal Board is an active collaborator in encouraging illegal encroachments and illegal constructions inasmuch as the Board has itself invited tenders for allotting the work of construction of wall in the middle of the road. A copy of the work order dated 12.12.2005 inviting tenders has been placed on record to substantiate this. The petitioners have placed on record photographs of the road in question which clearly indicate construction of a fresh wall in the middle of the road. The petitioners have explained with the help of site plans of the new yard and the old yard as to how important these roads are to these yards and surrounding localities and in what manner constructions are

being permitted to be raised by the encroachers. It has been alleged that the functionaries of the Municipal Board are hand in gloves with the illegal occupants of the public land and have taken no steps to prevent illegal encroachments. Similarly, it has been asserted that illegal encroachments have been made on Nehru Dharamshala Road as well. The photographs showing such illegal constructions have also been placed on record. In spite of the fact that the petitioners made number of representations to the respondents one after the other, no action has been taken by the Municipal Board against such illegal encroachments. The respondents are rather proceeding to regularize such illegal encroachments. It has therefore been argued that the writ petition be allowed in terms of the prayer extracted above.

The respondent Municipal Board in its reply has raised preliminary objection about the maintainability of the writ petition that it has been filed with the motive of gaining personal benefits inasmuch as many of the petitioners are having occupation and business in the Mandi area and therefore they have a personal interest in the matter. This matter therefore cannot be described as a public interest litigation. It has been stated that one of the

petitioners Baltej Singh is having 8-9 shops in his ownership on the Kharlia Road itself and therefore he is more worried about the downfall that may be caused in the value of his shops because of the constructions on the road. It has been submitted that the encroachments on the land and the constructions raised thereupon are all quite old and such illegal encroachments have been persisting their for last about 20 years. Originally the yard was established by the Krishi Upaj Mandi Samiti and it was the Mandi Samiti which used to maintain the yard. In course of time however Municipal Board, Pilibanga came into existence by order of the government dated 22.5.2002 and therefore entire area of yard including its upkeep and maintenance came in the charge of the Municipal Board. It has been stated that the controversy with regard to the existing encroachments is pending consideration before this Court in S.B.Civil Second Appeal No.181/96 titled as "Tehbazari Mandi Union vs. Krishi Upaj Mandi Samiti & Ors.". In the said second appeal also the appellant Union submitted an application for impleading Municipal Board as a party respondent. It is basically the Municipal Board, Pilibanga which is concerned with the dispute in question. It cannot be therefore be contended that it was Municipal Board which was

responsible for encroachments on the land in question. Learned Single Judge of this Court in the aforesaid second appeal has passed an interim order against the respondents to the effect that they shall not interfere with the business activities of the members of the appellant union. It has been stated that in compliance of the interim directions issued by the learned Single Judge, the Municipal Board got a survey of the area conducted and found that there were 288 encroachments which have been made on public roads. It has been argued that in view of the interim stay order passed in the said second appeal, huge quantity of gravel, stones, concrete etc. were dumped on the road and this was causing inconvenience to the public because free flow of the traffic was adversely effected and routine life of residents of the area was disturbed. Since the encroachments were made much before handing over charge of the yards to the Municipal Board, it cannot be held responsible for the encroachments. The Municipal Board has admitted the correctness of the map prepared by the Chief Town Planner and Architectural Advisor, Public Works Department. It has been stated that according to this map original width of the Kharlia road was 80 feet and 40 feet space was left vacant for parking. Due to illegal constructions

however width of the road was reduced to just 55 feet. It has been stated that since the encroachment of 288 trespassers was existing on the public road for about 20 years and dispute thereabout was pending litigation before various Courts, it was not possible for the Municipal Board to remove entire encroachments until and unless the disputes were is finally resolved by the Courts. It has been clarified that purpose of inviting tenders to raise wall within the limit of the road was to ensure that the encroachers were restricted from further advancing on to the land of the road and their encroachments were restricted upto only 10 feet. In fact, general public has been benefited by this decision of the Board because earlier encroachments made in the size of 10' x 16' have now been reduced to just 8' x 10'.And this is also subject to the decision of the learned Single Judge of this Court in S.B.Civil Second Appeal No.181/1996. It has therefore been prayed that the writ petition be dismissed.

The petitioners have filed rejoinder to the reply in which it has been denied that encroachments on the road are more than 20 years old. Most of the encroachments are recent ones and have

been made in presence of the Executive Officer of the Board. So far as S.B.Civil Second Appeal No.181/96 is concerned, it has got nothing to do with the encroachments/constructions on the Kharlia Road. The respondents are trying to sanctify the encroachments made on the Kharlia road as well as Nehru Dharamshala road only by taking shield of the interim order passed in the second appeal. Even otherwise, Civil suit was filed by the union with only 150 members and therefore under the garb of interim order passed in second appeal, encroachments made by as many as 288 persons cannot be perpetuated. Reference has been made to Section 92 and 302 of the Rajasthan Municipalities Act, 1959 (for short the Act of 1959) according to which public roads are the property of the Municipal Board and it is responsible for their safety.

Earlier than filing the aforesaid second appeal, Tehbazari Mandi Union with only 40 members filed a writ petition before this Court namely S.B.Civil Writ Petition No.1543/91 in which their contention was that as per policy decision taken by the Government, unauthorised occupants were entitled to claim regularization. Since the members of their union were doing the petty businesses at

`footpath', they cannot be thrown out from the yard. The Krishi Upaj Mandi Samiti which was then incharge of the yard contested the writ petition and submitted that it was under a legal obligation to carry out the aims and objectives of the Rajasthan Agriculture Produce Marketing Act, 1961. The land in question was alloted to Krishi Upaj Mandi Samiti which was utilised for construction of market yard, auction platforms, rest house etc.. The land therefore could not be allowed to be encroached upon by those who claim to run their business on footpath and the road. The learned Single Judge by his judgment dated 4.7.1996 directed the State Government for allocation of alternative land to the members of the petitioner union and not to disturb them till such alternative land was made available. Krishi Upaj Mandi Samiti filed a special appeal against the judgment of the learned single Judge being D.B. Civil Special Appeal (Writ) No.468/1996 which was allowed by Judgment dated 01.05.1997. The Division Bench while reversing the judgment of the learned Single Judge directed as under :-

> "In this view of the matter, we set aside the judgment of the learned Single Jude and direct the State Government through the Collector of the District to consider individual applications of the members of the writ petitioner union for allocation of alternative lands. The State Government will also consider whether it will be possible for the

> Government to derequisition the land which has once been allotted to the KUMS only to regularise the individual members of the writ petition Union or, in the alternative, to allow continuance of the individual members of the writ petition Union at their present site without any preference to the claims of the KUMS."

According to the directions contained in the said judgment, the Additional Collector (Administration) and Administrator of the Krishi Upaj Mandi Samiti gave a proposal on 11.3.1998 in which 40 encroachments of all those persons who were doing the business were admitted. This place came to be known as `Bhadu Market' . It was stated that at present 34 shops were constructed. In the survey also, it was found that there were 216 more encroachments which were fresh. In this way 256 encroachments were found as on 11.8.1998.

It appears from the record that the injunction suit was filed before the Munsif Magistrate, Pilibanga which was decreed by that Court on 3.2.1993. The Krishi Upaj Mandi Samiti filed an appeal there against before the Additional District Judge, Hanumangarh who by his order dated 12.2.1996 set aside the judgment and decree passed by the Munsif Magistrate, Pilibanga and allowed the appeal thereby

reserving the order of injunction passed in favour of the plaintiff union. A writ petition, being S.B.Civil Writ Petition No.2088/96, was filed against both the aforesaid judgments by Tehbazari Mandi Union, Pilibanga and others. A learned Single Judge of this Court vide order dated 12.7.1996 dismissed the writ petition holding that writ petition was not maintainable against the aforesaid judgments. While dismissing the writ petition on the ground of alternative remedy, the learned single Judge permitted the petitioners therein to file second appeal and directed that the respondents not to interfere with the business activities of the members of the petitioner union for a period of two months only. It was directed that after expiry of two months' period, the ad interim order would come to an end. It was thereafter that Tehbazari Mandi Union filed the aforesaid second appeal before this Court on 17.7.1996. In that second appeal, an interim order was passed by the learned Single Judge on 25.10.1996 which was extended from time to time and lastly it was confirmed by order dated 3.2.1997.

We have carefully scrutinized the records of the second appeal. What is significant to note is that when the writ petition No. 1543/91 was originally filed, Tehbazari Mandi Union claimed to be a

registered union with only 40 members. When however the civil suit was filed in the year 1992, the union claimed that it had the membership of about 150 persons who are all traders engaged in the small time business activities. An application was thereafter filed by as many as 59 persons who claimed that they were also members of the plaintiff union and therefore they were impleaded as defendants in the civil suit so filed. The decree passed by the learned Munsif Magistrate, Pilibanga has included those persons as defendants no.5 to 63 in the aforesaid civil suit. A perusal of the judgment passed by the learned trial Court in that civil suit indicate that the claim made by the plaintiff union and those defendants in that case was based on various policy circulars of the government whereby it decided to regularise encroachments over the government land for a long period of time. The learned trial Court issued a perpetual injunction against the respondents including the defendants which included the State of Rajasthan through Collector, Sri Ganganagar, Additional District Magistrate-cum-Secretary, Krishi Upaj Mandi Samiti, Hanumangarh, Deputy Town Planner, Bikaner and Secretary, Krishi Upaj Mandi Samiti, Bikaner to the effect that none of the members of the plaintiff union should be evicted from the place of present

possession till an alternative site was allotted to them. The learned Additional District Judge, Hanumangarh in his judgment dated 12.6.1996 while allowing the appeal, set aside the judgment and decree holding that the defendants would be free to evict the members of the plaintiff union by due process of law. It is against that judgment of the learned Additional District Judge, Hanumangarh that the aforesaid second appeal has been filed by Tehbazari Mandi Union in which an interim order is operating till date.

It is indeed a matter of concern that those who are members of the Tehbazari Mandi Union, in spite of the fact that admittedly they are rank tress passers are persisting with their illegal encroachment over the land, most of which is part of the road for last more than a decade. Municipal Board does not seem to be making any serious effort to get the interim order passed in the aforesaid second appeal on 25.10.1996 vacated. Although by order dated 23.1.2006 the matter was ordered to be listed on 14.2.2006 but from the order sheet of the second appeal it appears that the matter was not listed on that day and in fact has not been listed on any date thereafter. We find from the order dated 23.2.2006 passed by the learned Single Judge in the aforesaid second appeal that the

Municipal Board belatedly applied to become a party to the appeal and on its application was allowed to be impleaded as a respondent therein. The Municipal Board has been directed to submit list of persons who according to it were not party to the civil suit because in that case no stay order would be operative in their favour. The appellant union was also directed to file a proper affidavit as to when was it constituted and if is registered , who were the members on whose behalf the suit was filed and whether all of them are in occupation of the land and further that if there was any change in the original composition of the Union, the same should be furnished with respective parties and properties also.

Mere pendency of the second appeal should not however detain us from observing that illegal encroachments made in the middle of the road and the manner in which the Municipal Board has surrendered into compromising with the encroachers by resolving to regularise part of such encroachments is nothing short of pleading utter helplessness and falling prey to greedy designs of the trespassers. What is disturbing to note that such surrender has been camouflaged as though it were in public interest ostensibly to save the remaining part of road from further encroachment thereby

restricting the extent of the trespass. We are indeed anguished to find that Municipal Board in its resolution no. 8 passed on 21.11.2005 has recorded an abject surrender in favour of such encroachers on the assurance of the trespassers that if their encroachments up to the extent of 8' x 10' are regularised, they would remove the remaining encroachments. It has been noted that each of the trespassers has constructed the shop by encroaching upon 10' x 16' feet size of the land in the middle of the road. It was therefore resolved that the width of the road should be reduced only to 55 ft. by allotting the land in the size of 8' x 10' to the encroachers. The photographs which have been placed on record by the petitioners clearly indicate that freshly constructed wall in the middle of the road has been raised. In fact the petitioners have placed on record a copy of the work order dated 22.12.2005 issued by none other than the respondent Board itself awarding contract to M/s Shubh Karan & Company to raise this wall on the middle of the road. This was complete abduction of its duties by the Board, which is supposed to be custodian of all public lands especially those of the public roads.

On examination of the Master Plan of the old marketing yard and the new marketing yard, it appears that these yards were set up by the Krishi Upaj Mand Samiti established under the provisions of Rajasthan Agriculture Produce Market Act, 1961. In course of time however the area of the yards came to be included within the limits of Municipal Board. Section 4(7) of the Rajasthan Municipalities Act, 1959 clearly provides that "when any local area is included in a municipality all rules and bye-law made, orders, directions, notifications and notices issued and powers conferred and in force throughout such municipality at the time when the said area is so included, shall apply thereto, unless the State Government otherwise directs from the date of such inclusion." There should be, therefore, no doubt that notwithstanding the fact that these yards were originally established by the Krishi Upaj Mandi Samiti, they being now within the Municipal limits, would be governed by the provisions contained in the Act of 1959. It would be useful to refer to some of the relevant provisions of the Act of 1959. While section 3(26) of the Act has defined 'public street', section 3(32) has defined 'street' which are for the facility of reference reproduced hereunder:-

"3(26)'public street' means any street-

(c)over which the public have a right of way, or
(d)which has heretofore been leveled, paved, metalled, channeled, sewered or repaired out of municipal or other public funds, or
(e)which, under any provision of this Act, becomes a public street;"

"3(32) 'street' means any road, bridge, foot-way, lane, square, court, alley or passage accessible, whether permanently or temporarily, to the public or any portion of the public, whether a thoroughfare or not, and includes on either side-

(i) the drains or gutters and the land upto the defined boundary, notwithstanding the projection over such land of any verandah or other super structure.

(ii) Every space, notwithstanding that it may be private property or partly or wholly obstructed by any gate post, chain or other barrier, if it is used by any person, whether or not occupying any abutting property as a means of access to or from any public place or thoroughfare; "

Section 80 of the Rajasthan Municipalities Act, 1959 provides that "every board shall be competent, subject to the prescribed restrictions & conditions to lease, sell or otherwise transfer any movable or immovable property belonging to it, including municipal land as also any Govt. land and so far as is not inconsistent with the provisions and purposes of this Act and the rules made there under, to enter into and perform all such contracts as it may consider

necessary or expedient in order to carry into effect the said provisions." The first proviso to the said section clearly state that "no such lease, sale, transfer and contract shall be binding on a board unless it is in conformity with the provisions of this Act and rules made thereunder" and second proviso further state that "no lease, sale, transfer of, or any other contract respecting any Govt. land shall be valid unless it is confirmed by the prescribed authority in the prescribed manner and on the prescribed conditions". Section 80-A which was inserted in the Act by the Rajasthan Laws (Amendment) Act, 1999 (Act No.21 of 1999) provided for regularization of possession of those who hold over the land which are deemed to have been placed at the disposal of the municipality under section 90B of the Rajasthan Land Revenue Act, 1956 upon resumption or by way of surrender of tenancy rights. The proviso to section 80A however has excluded certain categories of land for the purposes of allotment or regularization and it includes the lands earmarked for public utilities/services such as park, nursery, civil or military aviation, Bus-stand, transport terminal, railways, public roads, highways, footpath etc. Section 92 of the Act provides that every board may acquire and hold property both movable and immovable

whether within or without the limits of the municipality. Its sub-section (2) further provides that "all property of the nature therein specified and not being specially reserved by the State Government shall vest in and belong to the Board, and shall together with all other property of whatsoever nature or kind not being specially reserved by the State Government, which may become vested in the board, be under its direction, management and control, and shall be held and applied by it as trustee subject to the provisions and for the purposes of the Act". (emphasis supplied). Clause (f) of sub-section (2) of section 92 categorically include all public streets and the pavements, stones and other material thereof, and also all trees, erections, materials, implements and things provided for such streets as the property which shall be held and applied by the Board as trustee subject to the provisions and for the purposes of the Act. Section 98 of the Act which enumerates duties of the board provides that it shall be the duty of every board to make reasonable provision in regard to matters enumerated therein under its authority and apart from other duties it includes in clause (j) thereof the duty for constructing, altering and maintaining public streets, culverts, municipal boundary marks, markets etc. etc. Section 161 of the Act

further provides that it shall be lawful for the board to lay out and make new public streets, and to construct tunnels and other works subsidiary to the same and to widen, open, enlarge or otherwise improve any such streets, and to turn, divert, discontinue or stop up any such streets, and subject to the provisions of sub-section (2) of section 80 to lease or sell any such land therefore used or acquired by the board for the purposes of such streets, as may not be required for any public streets or for any other purposes of this Act. Sub-section (2) of section 161 further provides that in laying out or making, or in turning, diverting, widening, opening enlarging or otherwise improving any public street, the board may acquire, in addition to the land required for the carriage-way and foot-way and drains thereof, land necessary for the houses and buildings to form the said street and subject the provision contain in sub-section(2) of section 80, may sell and dispose of such additional land in perpetuity or on lease for a term of years, with such stipulations to the class and description of houses or buildings to be erected thereupon as it may think fit.

All the aforesaid provisions which are relevant for deciding the present controversy when projected upon the facts of the case would

make it clear that no trespass over any land of public road can be regularized. Total width of Kharlia Road in the Master Plan was originally fixed at 120 feet but because there were shops of grain yard on both sides, 40 feet wide area on its one side was left open for the purpose of parking, thus practically leaving only 80 feet for the road. It is out of this 80 feet that now by the impugned resolution No.2 and 8 in the proceedings of the Board dated 21.12.2005 (Ex.P-5) the respondents have decided to regularize encroachments of those who had illegally constructed shops in the middle of the road. In fact, the board by resolution No.2 decided to regularize large number of encroachments including in regard to encroachments on Nehru Dharmshala road in the old yard. The Board in its resolution No.8 also decided to regularize encroachments of Kharlia road to the extent of 8'x10'. Reading of the resolution gives the impression as if it was being done in the public interest because original extent of encroachment was 10'x16' and by limiting the encroachments upto 8'x10' only, the rest of the land would be saved and thereby become available for use as part of the road. The board in its resolution No.8 has taken note of the pendency of the civil second appeal, reference to which we have made above. In fact,

the Executive Officer of the Board pointedly brought this to the notice of the members attending the meeting and stated that direction of this court was that these trespassers should be accommodated else-where, but that was not agreed to and it was decided to regularize the encroachments at the existing place by reducing its extent. Simultaneously, such other encroachments were also decided to be regularized.

Before adverting to the merits of the case, we would like to make a comment as to the manner in which the Executive Officer of the Board has conducted himself. When a resolution was brought before the board for regularization of the encroachments, the Executive Officer brought to the notice of the House observations made by division bench of this court for allocation of alternative land. He however appears to have then remained content with mere lip service and did not proceed to send a note of dissent as provided for by section 68 of the Act. Section 68(2) clearly provides that where any proceeding or order of a board or of any of its committee or of the Chairman or Vice-Chairman or of any member is inconsistent with the provisions of the Act and the rules made thereunder is detriment to the interest of the board, the Executive Officer shall put

up a note of dissent and report the matter to the Collector of the district and the State Government. Sub-section(3) thereof further provides that after examining the note of dissent reported under sub-section (2), the State government or any officer authorized by it in this behalf may make such order as it thinks fit which shall be binding on the board. First proviso to section 80 clearly states that no such lease, sale, transfer and contract shall be binding on a board unless it is in conformity with the provisions of the Act and rules made thereunder. Second proviso to section 80 further state that no lease, sale, transfer of, or any other contract respecting any Govt. land shall be valid unless it is confirmed by the prescribed authority in the prescribed manner and on the prescribed conditions. Although the resolutions referred to above mentions about the fact of reference being made to the Government, but it has not been brought on record whether it was actually referred to the Government for approval and if so what steps were taken by the Government, but sub-section 2(b) of section 80 clearly provides that if the State Government or the authorized officer, upon examination of the record and after giving to the person interested a reasonable opportunity of being heard, is satisfied that the proposal to lease, sell

or transfer the Government land is not in accordance with or in contravention of the provisions of the Act, it may by order published in the Official Gazette, modify, cancel or rescind wholly or in part the proposal made for lease, sale or transfer of the Government land or any action or proceeding taken in pursuance thereof or may give any other direction as may be deemed proper. If the Executive Officer had been alive to his duties and vigilant enough to immediately send a note of dissent, the Government would have perhaps on its own level not allowed such an illegal resolution to stand and might have decided to cancel and/or rescind the same. We shall state the reasons for our arriving at the conclusion about such a resolution being not in conformity with the provisions of the Act and therefore illegal shortly hereafter.

A somewhat similar issue came up for consideration of this court in Ladhuram Vs. Municipal Board, Ganganagar, RLW 1967 page 255 in which a learned single Judge of this court on analyzing the provisions contained in sections 80, 92 and 161 of the Act of 1959 and analogues provisions contained in section 48(2), 99 and 100 of its predecessor enactment, namely Rajasthan Town Municipalities Act, 1951 and upon consideration of the law available upto then on

the subject, held that " the public are entitled to use the whole width of the public way, however wide it may be, for they are entitled to the benefit of the original dedication and to use every part of the public way." That was a case in which certain shops raised by encroachments on the land of two public roads were let out to the encroachers on tehbazari basis which had the effect of substantially reducing the width of the road. Even though a judgment from single bench but because of the lucidity of the expression and clarity of exposition of law on the subject in question we feel rather persuaded to extract para 13 of the judgment which is as under:-

"13. The provisions of secs. 48(2), 99 and 100 of the Rajasthan Town Municipalities Act, 1951, could not also be said to authorize the setting up of any such obstructions. Sec. 48(2) had the effect of vesting in and transferring to the Municipality all the public streets, and pavements etc. along with the control therein, with the direction that they shall be held and applied by it as a trustee and subject to the provisions and the purposes of the Act. So the section merely transferred the ownership and the control of the public streets to the Municipality which was, at the same time, required to hold and apply them as a trustee for the Act and not to defeat that purpose by causing obstructions thereon. Sec. 99 gave the power to the Municipality to lay out and make new streets and, inter alia, to widen, open and enlarge or otherwise improve any street, and to turn, divert, discontinue or stop up any such streets and, "subject to the provisions of sub sec. (2) of sec. 36, to lease or sell any such land, theretofore used or acquired by the municipal board for the purposes of such streets as may not be required for any public street or for any other purposes" of the Act. Sec. 36 provided that the Municipality would be entitled, among other things, to lease any immovable property "so far as is not inconsistent with the provisions

and purposes of this act". So it cannot be said that sec. 99 of the Act of 1951 gave the Municipality the authority to cause obstructions on a public street. The powers which weregiven to the Municipality over the public streets were meant to be exercised as a trustee and in a manner which was not inconsistent with the provisions and purposesof the Act. The setting up of stalls overa public way so as to narrow its width almostto half, when it passes through a highly crowded locality in a busy town like Ganganagar, cannot be said to be a purpose which was consistent with the provisions of the Act. Nor is section 100 applicable because it relates to the temporary closure of streets for the purpose of repair or the carrying out of any work connected with drainage, water supply or lighting etc. Sect. 92 and 161 of the Rajasthan Municipalities Act, 1959 are virtually reproductions of secs. 48 and 99, respectively of the Act of 1951 and I need not consider them seperably."

It was, therefore, held that the Municipality had no authority under the law to let out the offending stalls so as to obstruct the two public ways directly, by substantially reducing their original width of 50 feet as the obstructions amounted to public nuisance and were actionable for that reason. The aforesaid judgment was later upheld by the division bench in the case of M/s Pyare Lal Satpal and others s. Sant Lal and others, AIR 1972 (Raj.) 103. An argument was raised that the Municipality had the right under the law to let out the land in question for setting up temporary stalls on tehbazari basis. Reference was made to section 113 of the Rajasthan Town Municipalities Act, 1951, which is analogues to section 163 of the Act of 1959. Rejecting the argument, the division bench in para 10 of the

judgment held that "when the Act did not give any power to the Municipality to let out portions of a public highway for putting up stalls for carrying on business, this could not be done by framing any bye-laws". It was held that section 129 of the Act of 1951, which is analogues to section 90 of the Act of 1959, does not contain any clause specifically empowering the Municipality to frame byelaws about letting out parts of national highways on tehbazari. Upon consideration of the law on the subject with reference to the judgment of the Privy Council in the case of Syed Manzoor Hasan Vs. Syed Mohd. Zaman, AIR 1925 Privy Council page 36, the division bench held that such an obstruction on public highway constituted public nuisance. It would be apposite to extract relevant para 32 of the judgment which is as follows:

"32. The above case before the Privy Council was clearly one for the removal of public nuisance. We have referred to the definition of public nuisance above. It includes an act which causes or which must necessarily cause injury, obstruction, or annoyance to persons who may have occasion to use any public right. An individual has a public right to pass along a public highway practicing his religious observances peacefully and if any one interferes with this right, he commits public nuisance. A body of persons have the same right as an individual. A suit for declaration of such a right and for injunction restraining those who interfere with it is a suit for removal of a public nuisance."

Constitutional bench of the Hon'ble Supreme Court in the case

of Municipal Board, Mangalur Vs. Mahadeoji Maharaj, AIR 1965 SC 1147, while considering the question with regard to right to way held that " the inference of dedication of highway to the public may be drawn from a long user of the highway by the public. The width of the highway so dedicated depends upon the extent of the user. The side lands are ordinarily included in the land for they are necessary for the proper maintenance of the road. In the case of a path way used for a long time by the public, its topographical and permanent landmarks and the manner and mode of its maintenance usually indicate the extent of user."

Their lordships of the Supreme Court in the case of State of U.P. Vs. Ata Mohd. AIR 1980 SC 1785 while considering somewhat similar question held that the nature of the right that vested in the Municipality in regard to public street is only qua street and if the Municipality put the street to any other user than that for which it was intended, the State as its owner, was entitled to intervene and maintain an action to get any person in illegal occupation thereof evicted.

What is therefore to be seen in the present case is whether the Municipal Board by the impugned resolution could have decided to

regularize the possession of encroachers with regard to whom it has all along been maintaining that they were rank trespassers and mostly, on the land duly notified as part of the road in the Master Plan of the originally set up marketing yards. Section 90(1) simply permits the Municipal Board to make by-laws not inconsistent with the Act and clause (o) thereof merely authorizes the board to make byelaws regulating the conditions on which permission may be given for the temporary occupation of, or the creation of temporary structures on public streets, or for projections over public streets. In that authority of law however, the board could not confer upon the trespassers title or perpetual lease hold rights. There are two categories of land which fall within the municipal limits of the board; the one which may belong to the Board and, therefore, vest in it and the other one is which may although vest in the board but does not belong to it. The lands falling in the later category are generally those which belong to the Government and which may be by any general or special order vested in the Municipal Board by the Government as provided for by clause (e) of section 90(2). The lands placed at the disposal of the Municipality by virtue of section 102A of the Land Revenue Act and deemed to have placed at its disposal by

virtue of section 90B of the Land Revenue Act, which is referred to in section 80A of the Act of 1959, also fall in this later category. In fact, section 98 has obligated upon the boards by including construction, alteration and maintenance of the public street as one of the duties to ensure preservation and protection of such public roads. Section 161, therefore, cannot be interpreted in isolation of other relevant provisions such as section 90, 90(1)(b), 92, 98(j) and sections 162 to 165. All these provisions have to be construed harmoniously so as to interpret them in such a way as may lead to attainment of the object of the enactment and make the Act a workable piece of legislation. So construed, we are clear in mind that sub-section (1) of section 161 only provides that it shall be lawful for the board to lay out and make new public streets, and to construct tunnels and other works subsidiary to the same and to widen, open, enlarge or otherwise improve any such streets, and to turn, divert, discontinue or stop up any such streets, and subject to the provisions of sub-section (2) of section 80 to lease or sell any such land therefore used or acquired by the board for the purposes of such streets, as may not be required for any public streets or for any other purposes of the Act. Sub-section (1), therefore, clearly refers to only such land which

although originally was intended to be used and acquired by the board for the purpose of street, but which may not eventually be required for any public street or for any other purposes of the Act. This provision, therefore, obviously refers to additional or surplus land which may although have been acquired and taken possession of for the purpose of public street, but may not be actually required for public street and cannot be put to any other use for the purpose of the Act, therefore, can be leased or sold out. Sub-section(2) of section 161 has also to be given a purposeful interpretation. Sub-section (2) merely provides that in laying out or making, or in turning, diverting, widening, opening enlarging or otherwise improving any public street, the board may acquire, in addition to the land required for the carriage-way and foot-way and drains thereof, land necessary for the houses and buildings to form the said street and subject the provision contained in sub-section(2) of section 80, may sell and dispose of such additional land in perpetuity or on lease for a term of years, with such stipulations to the class and description of houses or buildings to be erected thereupon as it may think fit. Sub-section (2) thus clearly refers to additional land which is acquired over and above the requirement of the public

street and, therefore, only such a surplus land would be available for sale or lease but that again has been subjected to sub-section (2) of section 80 of the Act. The legislature has, therefore, clearly intended that object of the Act has to be placed upper most in implementation of its various provisions and, therefore, it has purposely given over-riding effect to sub-section (2) of section 80 and has made section 161 subservient thereto.

We are, therefore, of the considered view that the portions of the land which were falling in the midst of the road and with regard to which the Board had been in litigation with the trespassers could not be considered as additional or surplus land so as to be leased/sold out. This intention of the Legislature has further been reflected in the recently introduced section 80A inserted by Amending Act of 1999 in proviso to which, the lands earmarked for public utilities/services have been completely kept out of the purview of regularization and the public utilities like public roads, highways and footpath, apart from several others, have been included in this category of exclusion. Whether the land may belong to the Board or it may be vested in it by the Government, in either of the categories, the Board acts only as a trustee especially of the lands of the public

streets, footpath and pavements etc. which are held by it in trust on behalf of the public at large. Public roads and the lands covered thereunder are in the form of dedication to the public which it is entitled to use to the extent of original dedication. Such land can not be alienated in any manner whatsoever except when part of it has become surplus and therefore unuseful as public road. The Board cannot therefore part with possession of such land and in no case on permanent basis by way of lease or sale or regularization or otherwise as has been done in the present case. Such a transaction being not in conformity with the provisions of the Act would clearly be hit by first proviso to section 80(1) of the Act of 1959 and would, therefore, be liable to be annulled.

Collective decisions of a public body like Municipal Board are always open to judicial review and liable to be annulled if on scrutiny they are found to be contrary to the provisions of the enactment to which such body owes its existence. We upon threadbare examination of the matter are of the considered view that the present case requires interference of this court because the impugned resolutions are not only not in conformity with the provisions of the Act, but also because the State Government in spite

of specific provision contained in section 80(2) of the Act has failed to discharge its obligations to undo such a wrong. In our considered opinion, the decision of the board to regularize encroachments over public road was besides being contrary to the various provisions of the Act was also opposed to public interest.

In the result, while setting aside the resolution Nos. 2 & 8 dated 21.12.2005 (Ex.P-5) in so far as they pertain to the regularization of the land on public roads/public streets, we direct the Municipal Board to remove the encroachments and evict all those who are not members of the Tehbazari Mandi Union within a period of three months. Eviction of the members of Tehbazari Mandi Union however shall abide by the decision of the learned single Judge in the aforesaid civil second appeal. We consider so to do appropriate in judicial propriety because many of trespassers are those who are members of Tehbazari Mandi Union, which has filed the aforesaid appeal in which status quo order is obtaining till date. We direct the registry to place the aforesaid second appeal before the appropriate bench for final disposal at the earliest. Let a copy of this judgment be placed on the records of aforementioned S.B. Civil Second Appeal No.181/96. Any dispute with regard to the fact whether a particular

trespasser is member of the said Union or not, shall be decided by the learned single Judge in the said appeal.

The present writ petition is allowed with the aforesaid directions with no order as to costs.

(MOHAMMED RAFIQ), J. (S.N.JHA), CJ

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